91-163

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IN THE

Supreme Court of the United States

October Term 1991

MATTHEW B. GOODALL, An Infant By His Father and Next Friend, Robert B. Goodall and Robert B. Goodall and Kathleen N. Goodall,

Petitioners

v.

STAFFORD COUNTY SCHOOL BOARD,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CORRECTED APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Matthew B. GOODALL, an infant by his father and next friend, Robert B. GOODALL; Robert B. Goodall; Kathleen N. Goodall, Plaintiffs-Appellants,

v.

STAFFORD COUNTY SCHOOL BOARD, Defendant-Appellee.

No. 90-1014

United States Court of Appeals, Fourth Circuit.

Argued Jan. 10, 1991.
Decided April 11, 1991.

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and YOUNG, Senior U.S. District Judge for the District of Maryland, sitting by designation.

MURNAGHAN, Circuit Judge:

Matthew B. Goodall, an infant by his father and next friend (and counsel) Robert B. Goodall, Robert B. Goodall and Matthew's mother, Kathleen N. Goodall

(collectively the Goodalls), brought an action in the United States District court for the Eastern District of Virginia, Alexandria Division, seeking an order directing appellee School Board of Stafford County, Virginia to provide Matthew, who is deaf, with a cued speech interpreter at Fredericksburg Christian School. The Goodalls also sought reimbursement for costs incurred in providing such an interpreter themselves. On cross-motions for summary judgment, the district court entered judgment in favor of the County, and the Goodalls have appealed.

Matthew Goodall is a minor and has been a resident of Stafford County since his birth. He became profoundly hearing impaired after an attack of meningitis

at age 3 1/2. Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate.

In 1980, 1981 and 1983, Individualized Educational Plans (IEPs) were prepared for Matthew, with the consultation and concurrence of Matthew's parents, calling for special education and related services to be provided at Spotswood Elementary School, a public school. Matthew attended preschool class in the regional special education program at Spotswood Elementary School along with several other deaf children who were about his age. Matthew continued to participate in the program through the first grade.

In 1984, Matthew's parents voluntarily placed Matthew at The Word of Life School, a private religious school in Fredericksburg, Virginia, which he attended through the fourth grade. In 1986, they voluntarily placed Matthew in the Stafford Christian School, a private religious school in Stafford, for the fifth and sixth grades.

In 1988, Matthew's parents decided that he should attend Fredericksburg Christian School, a private religious school, to further his religious education and development. Fredericksburg Christian School is a sectarian, religious school, in which Christian teachings are woven into the curriculum together with non-religious

subjects. The curriculum includes Biblical education and spoken prayer as one of the daily activities. Matthew receives no special education at Fredericksburg Christian School.

In the summer of 1988, the Goodalls requested that the public schools of Stafford County again provide special education services to Matthew. An IEP meeting was held in September of 1988. The Goodalls participated in the meeting and a draft IEP was prepared. The draft IEP indicated that hearing-related services were still appropriate for Matthew and proposed to provide those services at the Drew Middle School, a Stafford County public school.

Matthew's parents objected to Matthew's receiving interpretive services at Drew Middle School and asked the County to provide a full-time cued speech interpreter at Fredericksburg Christian School. The Goodalls wanted the County to provide a cued-speech interpreter to be present, full-time, in Matthew's classroom. The interpreter's job would be to interpret the sounds in the classroom into physical representations that Matthew could understand. Thus, the interpreter they envisaged would need to be present during Matthew's religious instruction and would interpret that religious instruction to enable Matthew to understand.

The County denied the Goodalls' request, but offered to provide a cued speech interpreter to Matthew at Drew Middle School, a public school in Stafford County. Nothing suggests other than that the County stands ready to do so today. The Goodalls requested a due process hearing to challenge the County's position. The state Hearing Officer ruled that the County was not responsible for providing a cued speech interpreter to Matthew because he was unilaterally placed in a private, sectarian school by his parents for personal reasons. The Hearing Officer further held that for the County to provide a cued speech interpreter at Fredericksburg Christian School with public funds would violate the

Establishment Clause of the First Amendment to the United States Constitution.

The Goodalls appealed the Hearing Officer's decision to the Virginia Department of Education. The state Review Officer's decision of September 9, 1989 affirmed the decision of the HEaring Officer, specifically holding that the requested action would violate the Establishment Clause.

The Goodalls then filed the action currently before us on October 10, 1989, seeking an order directing the County to provide a cued speech interpreter for Matthew Goodall at Fredericksburg Christian School and seeking

reimbursement for their costs incurred in providing such an interpreter to Matthew.

From a summary judgment in the favor of the County School Board the Goodalls have appealed.

[1] We first address the question whether Virginia or the federal special education law requires the County to provide a cued speech interpreter to a student at a private, sectarian school. The Goodalls have contended that the Virginia laws and regulations implementing federal assistance under the Education of All Handicapped Children Act, 20 U.S.C. section 1400 et seq (EHA), require Stafford County to

provide Matthew with a cued speech interpreter at the Fredericksburg Christian School.

The EHA is a comprehensive entitlement program providing federal financial assistance to participating states for the education of handicapped children. To qualify for the funds, a participating state must have in effect "a policy that assures all handicapped children the right to free appropriate public education." Id. section 1412(1). See generally Board of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Act places primary responsibility for the provision of such appropriate public education on state and local educational agencies. 20 U.S.C. section 1400. Receipt of federal

funds is also conditioned upon submission of a satisfactory special education plan. Id. section 1412(2).

The Commonwealth of Virginia is a participating state and has established the required policy in the Virginia Code, sections 22.1-213 to -221; the Virginia Constitution, art. VIII, section 10; and the state's special education regulations. See Schimmel By Schimmel v. Spillane, 819 F 2d 477, 484 (4th Cir. 1987). Virginia's policies and procedures have been approved by the United States Department of Education.[1]

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1. Fredericksburg Christian School is not on the list of private schools approved by the Virginia Department of Education to provide special education and related services under the EHA.

Several provisions of the Virginia Code implementing the EHA specifically draw a distinction between nonsectarian schools and sectarian school such as Fredericksburg Christian School. See Va. Code Ann., sections 22.1-216, 218, and 220. The Goodalls seek to advance the argument that the combined effect of the three statutes, limited as they are to non-sectarian private schools, does not prohibit the County from furnishing Matthew with a cued speech interpreter at a sectarian school because, while a religious school contract is not referred to in section 22.1-216, the County could provide the service with its own employees or with interpreters hired through non-sectarian schools or

agencies.[2] With the hope of buttressing their position, the Goodalls point to section 22.1-219 of the Virginia Code:

> Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant.

Ingenious the Goodalls' arguments may be, but they fail to hold water when viewed from the greater context of the general prohibitions regarding sectarian schools found in the Virginia Constitution and other sections of the Virginia Code. As one example, in

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2. Other arguments to like effect are advanced that 1) the Goodalls, not the County School Board, would place Matthew at Fredericksburg Christian School, and 2) limitations as to what, under the law of the Commonwealth, the County School Board could do would not extend to county expenditure of federal EHA funds.

legislating for children in the custody of state boards or agencies, the General Assembly has authorized education in any public or "private nonsectarian school" but not in sectarian ones. Va. Code Ann section 22.1-7. In addition, Article VIII, section 10 of the Virginia Constitution prohibits appropriations to sectarian schools or institutions of learning.

Virginia's constitutional terms and statutory language consistently express a policy of funding special education only in nonsectarian schools. Section 22.1-219 was simply designed to ensure that handicapped students are not denied the benefit of other federal, state or local programs simply because Virginia has mandated the delivery of a free and

appropriate education for them. The interpretation sought by the Goodalls would eliminate in large measure the "nonsectarian" qualification in Virginia Code sections 22.1-216, 218, and 220, as well as the Virginia Constitution. See Posey v. Commonwealth, 123 Va. 551, 553, 96 S.E. 771 (1918) (ruling that a statute should be interpreted in a way that gives effect to all of its provisions).[3]

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3. The Goodalls' reliance upon Va. Special Educ. Reg. 3.4(B)(7) is similarly unavailing. That regulation merely stands for the proposition that if a parochial school student takes advantage of special education and related services offered by the local educational authority, representatives of the parochial school must be afforded the opportunity to participate in the development of the student's IEP. Nothing in the language of the regulation suggests a requirement for the County to provide special education and related services to parochial students on site.

Moving agilely to another legal area, the Goodalls next contend that, even if Virginia law can be construed as prohibiting the County's provision of a cued speech interpreter at Fredericksburg Christian School, federal law - the EHA - mandates such a requirement, and thus by nature of the Supremacy Clause, displaces Virginia law.

The attempt to place state and federal law at odds with one another is grounded on an assertion made by the County before the district court a) that the EHA expressly incorporates state educational standards, and b) that, when a handicapped child is educated at a private school under the EHA, the state

has an obligation to ensure that the school meets those educational standards. See Schimmel By Schimmel, 819 F 2d at 484; 20 U.S.C. section 1413(a)(4)(B).

The Goodalls have noted that the EHA, the federal regulations promulgated thereunder, and the Virginia Special Education Regulations all draw distinctions between handicapped students enrolled in private schools by the state and handicapped students enrolled in private schools by their parents. The federal statute, 20 U.S.C. section 1413(a)(4)(B), which places an obligation upon the state to ensure that private schools meet state educational standards explicitly applies only to students placed in private schools by

the state. Thus, the Goodalls urge, in a logical leap of rather Gargantuan size, that the EHA prohibits the state from imposing its educational standards - specifically, the sectarian, non-sectarian distinction - on private schools at which handicapped students are voluntarily enrolled by their parents.

If anything, however, section 1413(a)(4)(B) imposes an additional burden on the state when expending federal funds by enrolling handicapped students at private schools. In such a case, for example, the EHA would prohibit a state from placing a handicapped student in a non-accredited private school. With regard to expenditures of federal funds for

handicapped students voluntarily enrolled at private schools, the state is simply relieved of its state standard burden, if it so chooses, but is free, on the other hand, to take on that burden if it wishes.

The distinction does take on additional significance, however, with regard to the type of assistance the EHA requires to be provided. And as the district court has correctly asserted, the key issue in the instant case is the meaning of the regulatory requirement that school divisions "provide" special education and related services to private school handicapped children.

34 CFR section 300.403(a) provides that

> [i]f a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under sections 300.450-300.460. (Emphasis added.)

34 CFR section 300.452 provides:

> Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency. (Emphasis added.)

And 34 CFR section 76.654(a), part of the Educational Department General Administrative Regulations (EDGAR), obliges local school divisions to provide "program benefits" that are "comparable in quality, scope, and opportunity for participation" to the

program benefits that the subgrantee provides for students enrolled in public schools.

Despite the fact that the County stands ready to provide Matthew with a cued speech interpreter at Drew Middle School, the Goodalls insist that the federal regulations quoted above require the provision of such services on the premises of sectarian institutions.[4] A wealth of authority from federal district courts, the Department of

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4. Apparently the argument must become that Matthew does not have "available a free appropriate public education" because education is not appropriate unless it is provided at Fredericksburg Christian School. While we admire the Goodalls' tenacious attempts, any such contention, if successful, would play ducks and drakes with the statute and regulations.

Education, and other sections of the Code of Federal Regulations, however, overwhelmingly refutes the argument.

In McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987), the district court held:

> Where a free appropriate public education is available, and the parents choose to place their child in a private school, the school district is not required to pay for the child's education, but is only required to (1) have free appropriate public education available to the child should she return to public school, and (2) provide a genuine opportunity for equitable participation by the child in programs funded under part B of the Act within the jurisdiction served by the local school district.
>
> ***
>
> We find that section 300.452 can only be interpreted to mean that a local school district need not pay for a child's related services when the child's parents choose to place her in a private school.

Id. at 1372 (emphasis added). See also Work v. McKenzie, 661 F. Supp. 225, 229 (D.D.C. 1987) (when public agency provides free appropriate public education, and parents choose to place child in private school nevertheless, public agency is not required to pay for child's education at private school).

In Barnett v. Fairfax County School Board, 927 F 2d 146 (4th Cir. 1991), we held that the local school system was not required to duplicate a cued speech program for the plaintiff alone merely because there existed a high school which was slightly closer to his house or which he would rather attend. In so ruling we noted that "[a]dopting plaintiff's position would require us to intrude upon the educational policy

choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make." Id. at 152-153.

The emphasis on provision of an opportunity is clearly stated in 34 CFR section 76.651(a)(1):

> A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in sections 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

If the Goodalls are held to be correct in their reading of federal law, the U.S. Department of Education would not properly have been able to accept the prohibitions on services to sectarian schools contained in Virginia's constitution and statutes. Nor would it have approved the Virginia regulation listing acceptable alternatives for school division compliance with 34 CFR section 300.403, which provides:

> Services to private school handicapped children may be provided through dual enrollment, educational radio and television, and the use of mobile educational services and equipment.

Va. Spec. Educ. Reg. III(3.4)(B)(9)(c) at 73.

Most telling is the Department of Education's response to an inquiry submitted by Robert Goodall to Dr. Judy Schrag, Director of the Office of Special Education Programs, reported at Goodall, 16 EHLR 1398 (1990). In the inquiry, Goodall asked the Department to invoke a "by-pass" provision set out in section 1413(d) of the EHA, whereby the Secretary of Education is authorized to implement a bypass if a state educational agency is prohibited by law from providing for the participation of private school handicapped children in the program assisted or carried out under the Act. The law Goodall claimed as the basis of his by-pass request was Va. Code Ann. section 22.1-216, supra.

In denying Goodall's request, the Department stated:

> The statutory provision [section 22.1-216], on its face, only precludes a local educational agency (LEA) in Virginia from contracting with private sectarian schools for the purpose of providing special education to children with handicaps enrolled in those schools. There is nothing in the law which would prevent an LEA from using its own personnel and facilities to provide special education to those students, as long as it did not contract with a private sectarian school. At most, this law precludes LEAs from serving children with handicaps on the site of private sectarian schools. A limitation on the location at which some children with handicaps enrolled in private schools can be served, however, does not constitute a prohibition against the participation of these children in the special education program carried out pursuant to the EHA-B by Virginia and its LEAs . . .
>
> SEA's [State educational agencies] and LEAs do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 USC section 1413(a)(4)(A). Rather, department regulations provide that

> students with handicaps enrolled in private schools must be provided by SEAs and LEAs "with a genuine opportunity for equitable participation' in the special education carried out by these agencies. The Department has long held that it is possible for SEAs and LEAs to provide students with handicaps enrolled in private schools with a genuine opportunity for equitable participation by serving them at a public school or neutral site. Whether an LEA would have to provide on-site services to meet the "equitable participation" requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

Id. at 1399-1400 (citation and footnote omitted).

In short, by offering Matthew the services of a cued speech interpreter at Drew Middle School, the County is in full compliance with the requirements of the EHA and the regulations promulgated thereunder. If the County's offer of

services in a public school is "meaningless" to Matthew, as his parents claim, it is because of the parents' decisions and conditions for Matthew's education, not by the operation of any state or federal law.

Finally, lest there be any remaining question as to a conflict between the EHA and the prohibitions against funding to sectarian schools imposed by Virginia, 34 CFR section 76.532 of EDGAR provides, in pertinent part,

(a) No state or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

The County's provision of a cued speech interpreter to Fredericksburg Christian School would fall squarely within the regulation's prohibition.

[2] Failing to persuade us at the statutory level that cued speech must be provided to Matthew at Fredericksburg Christian School, the Goodalls have turned to the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. They have insisted that the district court's reaching a decision on non-constitutional grounds could not stop there but must proceed to discuss constitutional problems. We agree.

This is not a case where resolution of the constitutionality of a statute may be avoided where a construction of the statute is fairly possible. See Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115, 122, 76 S. Ct 663, 666, 100 L. Ed. 1003 (1956) ("case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems"); 16 Am. Jur. 2d Constitutional Law sections 160, 172 (1979). It is not the state or federal education statutes the Goodalls challenge constitutionally, but rather, the actions of the County. We must thus go on to consider whether the County's actions pass constitutional muster. See Johnson v. Mayor and City of Baltimore,

731 F 2d 209, 210-11 (4th Cir. 1984)(Baltimore City's pension plan examined under Equal Protection Clause of Fourteenth Amendment and under Age Discrimination in Employment Act of 1967, 29 USC section 621 et seq.).

The Goodalls have alleged that the County's denial of publicly funded cued speech interpretation at Fredericksburg Christian School burdens their religious belief that "they are to provide their children with Christian education and to educate their children in Christian schools." In so asserting, they rely on a line of Supreme Court cases holding that the denial of unemployment compensation benefits for persons whose religious beliefs prevented them from working on certain days of the week or

in certain occupations violated the Free Exercise Clause of the First Amendment. Frazee v. Illinois Dep't of Employment Security, 489 US 829, 109 S. Ct. 1514, 103 L Ed 2d 914 (1989); Hobbie v. Unemployment Appeals Comm., 480 US 136, 107 S Ct 1046, 94 L Ed 2d 190 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 US 707, 101 S Ct 1425, 67 L Ed 2d 624 (1981); Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963). The court held, for example, in Thomas that,

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the

> compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 US at 717-18, 101 S Ct at 1431-32. Those cases held that such infringements must be subjected to district scrutiny and can be justified only by a compelling state interest. Because we find a compelling state interest to exist, we find that the Free Exercise clause has not been violated.

It is the well-settled law of the Fourth Circuit that the avoidance of a violation of the Establishment Clause of the First Amendment constitutes such a compelling state interest. See Smith v. County of Albermarle, 895 F 2d 953, 959-60 (4th Cir.), cert. denied, - US -, 111 S Ct 74, 112 L Ed 2d 48 (1990); Langlotz v. Picciano, 683 F Supp. 1041,

1048 (E.D. Va. 1988), aff'd, 905 F 2d 1530 (4th Cir. 1990) ("Plaintiff's free exercise rights . . ., if any, are clearly outweighed by the [state's] compelling interests in avoiding Establishment Clause violations").[5] Accordingly, the County's decision not to provide Matthew with a cued speech interpreter in connection with his attendance at a sectarian school and the prohibitions against its so providing contained in Virginia and federal law, do not violate the Free Exercise Clause contained in the First Amendment of the Federal Constitution. It would be out

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5. The County's refusal to provide an interpreter is also justified by a compelling interest in not violating the establishment clause of Va. Const. art. I, section 16.

of the frying pan into the fire for the County to accede to the Goodalls' demands.

[3] The seminal Establishment Clause case is Lemon v. Kurtzman, 403 US 602, 91 S Ct 2105, 29 L Ed 2d 745 (1971), in which the Supreme Court has set forth a three-part test to determine whether government action impermissibly establishes, sponsors, or results in active involvement in religious activity. Such action violates the constitution if any one of the following prongs is not satisfied:

1. the government action must have a secular purpose;

2. the action must not have the primary effect of advancing religion; and

3. the action must not create excessive entanglement between church and state.

Id. at 612-13, 91 S Ct at 2111-12.

One proposition advanced by the County was that a cued speech interpreter at Fredericksburg Christian School would participate in the inculcation of religious tenets and beliefs, because the interpreter would communicate to Matthew all the religious messages propounded by Matthew's teachers. The Goodalls have attempted to counter that, even if the EHA were held to permit the provision of an interpreter at a sectarian school, the statute as a whole would still not have the primary effect of advancing religion.

The Supreme Court has denied various types of aid and services to Christian schools while permitting others, and a discussion of the distinctions between the two is instructive. In Lemon v. Kurtzman, the Court struck down statutes in Pennsylvania and Rhode Island which would have permitted the states to pay teacher salary supplements as well as provide reimbursement for textbooks and instructional materials. The reimbursement provisions were struck down despite guarantees that the teachers would segregate their religious beliefs from their teaching responsibilities, because "the potential

for impermissible fostering of religion [was] present." 403 US at 619, 91 S Ct at 2114.

In Meek v. Pittenger, 421 US 349, 95 S Ct 1753, 44 L Ed 2d 217 (1975), the Court noted that even providing instructional material and equipment to "religion pervasive institutions" would impermissibly foster religion even though those items were "ostensibly limited to wholly neutral, secular instructional material and equipment." Id. at 366, 95 S Ct at 1763.

Finally, in Grand Rapids School District v. Ball, 473 US 373, 105 S Ct 3216, 87 L Ed 2d 267 (1985), the Court, in striking down a scheme to provide public school programs on non-public

school sites, discussed how publicly funded programs related to education might impermissibly advance religion:

> First, the [personnel] participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial, symbolic link between government and religion, thereby enlisting - at least in the eyes of impressionable youngsters - the powers of government to the support of the religious denomination operating in the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

Id. at 385, 105 S Ct at 3223. The Grand Rapids Court went on to note that "[a]lthough Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or

government-sponsored indoctrination into the beliefs of a particular religious faith." Id.

Viewed in the light of those cases, especially the holding in Meek v. Pittenger, the providing of a cued speech interpreter in attendance at all-day sessions at a sectarian school would undoubtedly infringe the Establishment Clause. At least one district court has reached the same conclusion. In Zobrest v. Catalina Foothills, 1988-89 EHLR 441:564 (D. Ariz., July 19, 1989), the court ruled that

> the provision of a publicly-paid sign language interpreter at Salpointe, a pervasively sectarian school, would violate the separation of church and state.

***

> The interpreter would act as a conduit for the religious inculcation of James - thereby promoting James's religious development at government expense. That kind of entanglement of church and state is not allowed.

ID. (citing Grand Rapids and Meek v. Pittenger).

The cases of indirect aid which the Supreme Court has sanctioned and upon which the Goodalls rely are readily distinguishable from the instant facts.

The Goodalls rely primarily upon Witters v. Washington Dep't of Services for the Blind, 474 US 481, 106 S Ct 748, 88 L Ed 2d 846 (1986). Witters was a student attending a Christian College in the State of Washington who suffered from a progressive visual condition which made him eligible for state

vocational rehabilitation assistance to blind persons. Witters applied to a state agency for rehabilitation assistance consisting of payments for education. The Court held that the extension of aid under the Washington program to finance his training at the Christian college would not advance religion in a manner inconsistent with the Establishment Clause.

Witters is the last of a line of cases in which the Supreme Court has upheld tax deductions taken by and tuition reimbursements to students at religious institutions. See Committee for Public Education & Religious Liberty v. Regan, 444 US 646, 100 S Ct 840, 63 L Ed 2d 94 (1980); Committee for Public Education & Religious Liberty v.

Nyquist, 413 US 756, 93 S Ct 2955, 37 L Ed 2d 948 (1973); Sloan v. Lemon, 413 US 825, 93 S Ct 2982, 37 L Ed 2d 939 (1973). As such, the decision has little application to the instant case. In each of those cases, the Court was confident that there existed an "effective means for insuring that the cash reimbursements would cover only secular services." Regan, 444 US at 659, 100 S Ct. at 849. Witters and its predecessors provide little or no support for the provision of state-funded personnel working at sectarian institutions who would be directly involved in the inculcation of religious beliefs of the handicapped students they served.

Board of Educ. v. Allen, 392 US 236, 88 S Ct. 1923, 20 L Ed 2d 1060 (1968), and Wolman v. Walter, 433 US 229, 97 S Ct 2593, 53 L Ed 2d 714 (1977), also cited by the Goodalls, provide them with little support as well. In Board of Educ. v. Allen, the Court upheld a law which required public school authorities to lend textbooks free of charge to students in private schools even if the schools were religious. 392 US at 248, 88 S Ct at 1929. And in Wolman v. Walter, the Court approved the provision of state-prepared standardized tests and some health diagnostic services to sectarian school students. 433 US at 244, 97 S Ct at 2603. Essential to both holdings was the easily ascertainable,

purely secular content of the goods and services provided. In Matthew's case, the religious content of the cued speech aid provided at Fredericksburg Christian School would be pervasive. The County, in the proceedings below, made the point (without the Goodalls apparently disagreeing) that religion permeated every aspect of the daily curriculum of the Fredericksburg Christian School, and that Matthew's cued speech interpreter would be interpreting for him at all times.

We consequently have come to the conclusion that the relief sought is not afforded on statutory grounds and that no First Amendment violations ensue.

The judgment is AFFIRMED.

[STIPULATED FACTS]

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

Matthew Goodall, A minor)
by his father and next
friend, Robert B. Goodall,)

Complainant)

v.) STIPULATION

The School Board of)
Stafford County, Virginia,
)

Respondent
)

The parties stipulate as facts in this proceeding the facts set forth in paragraphs 1 through 9 of the statement of facts in the memorandum in support of Matthew Goodall submitted to Thomas A. Mickler, the review officer in the proceeding.

_____

MATTHEW GOODALL, a minor by his father and next friend, Robert B. Goodall

THE SCHOOL BOARD OF STAFFORD COUNTY, VIRGINIA

BY: _____

KATHLEEN S. MEHFOUD, ESQ.

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EDUCATION

ADMINISTRATIVE REVIEW

IN RE: MATTHEW GOODALL

STAFFORD COUNTY PUBLIC SCHOOLS

MEMORANDUM IN SUPPORT OF MATTHEW GOODALL

STATEMENT OF FACTS

At the hearing officer level the Goodalls requested that the facts listed in paragraphs 1-6 below be established either by stipulation or by proof at a hearing. No evidence was heard. The hearing officer did not make express findings of facts.

1. Matthew Goodall has been a resident of Stafford County since his birth. He became profoundly hearing impaired after an attack of meningitis at age 3 1/2. Shortly thereafter, he was identified as a handicapped child for whom special education services were appropriate, and began a preschool class using cued speech. At that time, Stafford County participated with other school divisions in a regional special education program. Matthew's class at Spotswood Elementary School included several other deaf children who were about his age: Wendy Cowan, Michelle Ayers, and Amy McGlone. As the children progressed in the use of cued speech and as they became kindergarden and first grade age, they were progressively main

streamed at Spotswood Elementary using cuing interpreters. Those school divisions later separated their special education efforts. The same children continued to be mainstreamed in public schools, each with a full-time, one-on-one, fluent cuing interpreter: Wendy Cowan in the Spotsylvania County schools, Michelle Ayers in the Stafford County schools, and Amy McGlone in the Fredericksburg City schools.

2. Cued speech is a visual representation of spoken language. It is a phonetic system. For example, every "guh" sound appears the same, whether the "guh" appears in "guppy", "government", or "kangaroo". Cued speech enables a deaf person to distinguish every sound spoken to him.

For example, the sounds "m" and "b" look alike on the lips of the speaker. Obviously, they sound different. In cued speech, different hand shapes in different positions near the mouth of the speaker distinguish sounds that look the same. One advantage of cued speech is that both the speaker and the "listener" do not learn any new vocabulary. Cued speech is conceptually very easy to understand, but it takes months for a highly motivated person to be able to cue conversationally, i.e., to be able to cue anything he says. It takes even longer to cue fluently enough to "interpret" for another speaker who is speaking at his own conversational speed.

3. A cued speech interpreter does not teach. He or she is simply the "ears" of the hearing impaired child by simultaneously and visually representing the sounds of anyone speaking in the presence of the hearing impaired child. The interpreter does not affect the content of speech. In fact, a machine sometimes called an "autocuer" is being developed which may eventually take the place of the human interpreters.

4. For the 1988-89 school year, Matthew's parents placed him at Fredericksburg Christian School. Fredericksburg Christian School has never provided a cued speech interpreter to any student, and does not now provide a cued speech interpreter to Matthew Goodall. Matthew's parents have borne

the burden of providing interpreters: his mother Kathy Goodall has interpreted for him since the beginning of the 1988-89 school year. In addition, the Goodalls have paid Alicia Steele $107.70 per week to come to school three days a week, at first to improve her cuing skills, and then to take over some of the interpreting duties. Mrs. Steele had learned cued speech before the school year began, but was not fluent enough to interpret.

5. Stafford County agrees that a full-time interpreter for Matthew is appropriate.

6. An interpreter for Matthew would necessarily be one-on-one. Stafford County has no other 6th grade hearing impaired student using cued

speech. If there were more than one such student, they might each still require one-on-one interpreters for a variety of reasons, but that is not an issue in this case.

In addition they submit as facts the following:

7. Stafford County pays more than $7,000.00 for a qualified cued speech interpreter.

8. Matthew was placed by his parents in private, Christian schools from the early 1980's. When his parents requested special education for the 1988-89 school year, a new evaluation of Matthew was conducted to determine that he was handicapped (deaf) and required such services.

9. Matthew is successfully mainstreamed full time with hearing students at Fredericksburg Christian School. To be successfully mainstreamed, he requires the special education and related service of a full time, fluent cuing interpreter in his regular classroom. In contrast, the special education and related service of speech therapy need not be rendered in the regular classroom.

[April 11, 1989 Decision of State Hearing Officer, erroneously labeled "Decision of Review Examiner"]

V I R G I N I A:

VIRGINIA DEPARTMENT OF EDUCATION

Special Education Hearing

In re: Matthew Goodall

vs.

Stafford County School Board

DECISION OF REVIEW EXAMINER (sic)

Lewis C. Markel, Jr.
4551 Cox Road
Glen Allen, VA 23060

VIRGINIA:

SPECIAL EDUCATION HEARING

MATTHEW GOODALL

vs.

STAFFORD COUNTY SCHOOL BOARD

DECISION OF REVIEW EXAMINER (sic)

After careful consideration of the extensive briefing presented by counsel for Matthew Goodall, counsel for the Stafford County School Board, and an independent study by this Hearing Officer and his Associate, the following decision is rendered:

1. The Hearing Officer finds that the wording in the McNair vs. Cardimone applies. The state regulations do not require the state to assume the cost of a private education for a handicapped child or the cost of services related to

that private education which has been selected by the parents of the child for their own personal reasons, where the state has fulfilled its obligation by making its own appropriate program and related services available to those private school handicapped children.

2. Definitely the cued speech interpreter can edit at his will what is being taught the student. When the interpreter is required for 100% attendance, he violates the entanglement provision of the Constitution and is bound to interpret a certain percentage of religious teachings. This violates the entanglement of church and state. We agree that on occasion an assistant can be employed to assist a

hearing-impaired child, but in this case, the interpreter controls 100% of what this child hears.

3. In the Witter's case, relied upon by Mr. Goodall, "no entanglement challenge is properly raised on the record" according to the Supreme Court of the United States, thus, the entanglement issue was never raised in this case. Therefore, it has little relation to the case at hand.

4. Examining the record, all issues were stipulated and voluntarily waived as they rested upon this decision of the Hearing Officer. In view of the fact the decision is rendered in favor of the Stafford County School Board, the other issues are moot.

5. We are disturbed by the fact that the co-mingling of public funds to private institutions will water down the available funds for public education. The McNair case reinforces our concern.

6. Finally, in protection of the individual's right to attend private school, no public employee should spend each and every day on the school premises or we face the possibility of the government controlling freedom of religion and freedom of choice. This is the principle upon which this country was founded and the Constitution so written. We decide, therefore, that the Stafford County School system has an obligation to maintain services for the hearing-impaired and to employ efficient cued speech interpreters with the proper

training; but as long as efficient services are maintained within the public school system, we cannot allow public assistance to Matthew Goodall and thus, render a decision in favor of the Stafford County School Board.

April 11, 1989

Lewis C. Markel, Jr.
Hearing Officer

[Decision of State Review Examiner]

THOMAS A. MICKLER
Attorney at Law
422 North Columbus Street
Alexandria, Virginia 22314

September 9, 1989

Commonwealth of Virginia
Department of Education
P. O. Box # 6-Q
Richmond, VA 23216-2060

Attn. Ms. Kathy Klare,
Due Process Supervisor

Re: Matthew Goodall
vs.
Stafford County School Board

Gentlemen:

I regret taking so long with this matter but I found that it is a very close call. If it goes to the federal and/or state courts it could go either way.

However, after much soul-searching and study, I feel that I have made the correct decision in affirming the decision of the hearing officer. I could have given more reasons why I felt that the hearing officer was correct in

his decision, but I kept the matter as close to the original consideration as I could. It is my opinion that I should not go into matters not litigated in the original hearings.

Again, my regrets for my tardiness in this matter I feel that this or a very similar matter will and up before the Supreme Court of the United States of America for final decision.

Very truly yours,

Thomas A. Mickler

TAM/ssc.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EDUCATION

MATTHEW GOODALL,	)	
	)	
Petitioner	)	
	)	
vs.	)	Record No. _____
	)	
STAFFORD COUNTY SCHOOL BOARD,	)	
	)	
Respondent	)	

ORDER

Appeal from the decision of Lewis C. Markel, Jr., the hearing officer, dated: April 11, 1989.

This case arises from the appeal of Matthew Goodall from the decision of the hearing officer. The appeal is based on the denial of services to Matthew Goodall of a cuing interpreter at a private parochial school by the Stafford County School Board under the provisions of the public law passed by the 94th

Congress, Chapter 142. The school board objected to supplying the cuing interpreter at the Fredericksburg Christian School as this act would violate the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States of America.

The parties stipulated to the facts in writing and said stipulation is attached hereto and made a part hereof. However, the main facts are set forth herein as follows:

Matthew Goodall had an infection and it affected his hearing. In fact, he is seriously hearing impaired. He, at one time, was enrolled in the

Stafford County School System, but his parents removed him and enrolled him in the Fredericksburg Christian School.

Stafford County's School system supplied a cuing service to its hearing impaired students. The Fredericksburg Christian School does not have any such service available.

Matthew Goodall's parents petitioned Stafford County to supply a cuing interpreter at County expenses under the provisions of Public Law 94-146 of the United States Code. The County objected to this as to do so, in its view, would violate the First Amendment to the Constitution of the United States of America; that is the establishment of a religion. On this point, the issue was joined.

It is necessary to state that to comply with Matthew's request, the County School Board would have to pay for and send to the Fredericksburg Christian School a skilled cuing interpreter.

This hearing review officer agrees with the decision of the hearing officer entered on April 11, 1989. It is my belief that the maintenance and supplying of a cuing interpreter for Matthew Goodall at the Fredericksburg Christian School would violate the First Amendment to the Constitution of the United States of America. That is, such an act would be the establishment of a religion and violative of the first amendment.

This decision is based on Meek vs. Pittenger, Secretary, 421 U.S. 349 (1975). In the case, the Commonwealth of Pennsylvania authorized, by law, the providing directly to all children enrolled in non-public elementary and secondary schools that met the state's compulsory-attendance requirements "auxiliary services: The services included counseling, testing, psychological services, speech and hearing therapy and related services for exceptional, remedial or educationally disadvantaged students,: and such other secular, neutral, non-ideological services as are of benefit to non-public school children and are provided for those in public schools.

The Supreme Court of the United States of America found that this act to be unconstitutional as it would require the Commonwealth of Pennsylvania to assure that the school employees (the professionals) would not advance religion in the church-related school they serve. To assure that this would not be done, would require excessive entanglement of the state in the affairs of the church-related schools.

Similar results were found to be the case in Aguilar vs. Felton, 87 L. Ed. 2d 290.

For this reason, the decision of the hearing officer is affirmed.

Dated: September 9, 1989.

_____

Review Officer

E X E R P T

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MATTHEW B. GOODALL, et als., Plaintiffs,	)	
vs.	)	C.A. No. 89-1450-A
STAFFORD COUNTY SCHOOL BOARD, Defendant	)	

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10 a.m. on February 9, 1990.

BEFORE: The Honorable James C. Cacheris, Presiding
United States District Judge

APPEARANCES:

For the Plaintiffs: Robert Goodall

For the Defendant: Scott Cairns, Esq.
Kathleen Mehfoud, Attorney
J.T. Tokarz, Esq.

PROCEEDINGS

THE COURT: I think I'm ready to rule on this now. I think I understand the issues on the motions for summary judgment. On the defendant's motion to dismiss or in the alternative for summary judgment, plaintiff's motion for summary judgment.

On October 10, 1989, plaintiffs filed this action against defendant Stafford County School Board alleging a violation of the Education of the Handicapped Act, 20 U.S.C. section 1400, et seq. (EHA) Specifically, plaintiffs contend that the Act violated by defendant's failure to provide a cued-speech interpreter for plaintiff Matthew Goodall at his current school.

Defendant however has offered to provide a cued-speech interpreter in the public school of Stafford County.

Matthew Goodall is a 12-year-old resident of Stafford County, Virginia, and has been profoundly hearing-impaired since age three and a half. Matthew is currently a student at Fredericksburg Christian School, a private, religious school located in Fredericksburg, Virginia. His placement at this school was voluntarily made by his parents in the Fall of '88.

On September 9, 1989, following a review of the facts and arguments made by the parties to this dispute, a Review Examiner of the Virginia Department of Education, affirming a decision by a Hearing Officer, found that Stafford

County was neither obligated to reimburse the plaintiffs nor in the future pay for a cued-speech interpreter.

The Hearing Officer had principally relied on McNair v. Cardimone, 686 F. Supp. 1361 (S.D. Ohio, 1987). McNair held that a school board was not obligated to provide transportation services to a hearing-impaired student to and from private, voluntarily-chosen school. The Review Examiner further found that even if the services of the cued speech interpreter were required to be furnished by the Stafford County School Board, such action would involve impermissible entanglement between the state and the religiously-affiliated school.

Plaintiffs contend that the EHA mandates the furnishing of the cued speech interpreter. The EHA, as reflected in Section 1413(e)(4)(B), provides that, quote, any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a state plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each plan shall -- (4) set forth policies and procedures to insure -- (A) that provision is made for the participation

of such handicapped children by providing for such children special education and related services, unquote,

Pertinent provisions of the Code of Federal Regulations, which interpret and explain the relative statutory sections also, according to the plaintiffs, require the defendant to pay for the interpreter.

Specifically, 34 C.F.R. 300.403 provides, in part, that:

Quote, (i) if a handicapped child has available a free appropriate public education and the parents choose to place the child in the private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility.

However, the public agency shall make services available to the child as provided under section 300.450-300.460, unquote.

34 CFR section 300.452 provides that, quote:

Each local educational agency shall provide special education and related services designed to meet the needs private school handicapped children residing in the jurisdiction of the agency.

"Special education" is defined by the statute to mean, quote:

Specially designed instruction, at no costs to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, 20 U.S.C. 1401(a)(16), unquote.

Further, "related services" quote:

Means transportation, and such developmental, corrective, and other supportive service (including speech pathology and audiology, psychological services) as may be required to assist a handicapped child to benefit from special education, 20 U.S.C. 1401(a)(17), unquote.

Plaintiffs thus contend that the defendant is obligated to pay for this clearly "related service" of a cued speech interpreter for Matthew, who was placed by his parents at this private school located in Stafford County, Virginia.

Plaintiffs further assert that not only would the providing of the interpreter not involve impermissible

church-state entanglement, but the failure to so provide would prohibit plaintiffs' constitutional right to the free exercise of religion. Plaintiffs contend that "a cued speech interpreter does not teach" but is merely a conduit or the means by which a hearing-impaired student receives information conveyed by the teacher.

Thus, implicit in the plaintiffs' argument is that no impermissible church-state entanglement exists for even though the interpreter will be paid by the state, the interpreter (and indirectly the state) is not affirmatively communicating any message religion or otherwise.

Plaintiffs also argue that by denying Matthew Goodall the assistance of a cued speech interpreter at the Fredericksburg Christian School, but providing such assistance to hearing-impaired public school students, the state is essentially penalizing Matthew for his religious beliefs and thus violating his right of free exercise of religion.

Defendant first contends that the EHA does not require it to provide Matthew a cued-speech interpreter at the Fredericksburg Christian School. In this regard, the defendant argues that pursuant to Virginia law it is not required to pay for a cued-speech interpreter at the Fredericksburg

Christian School. Indeed Virginia law prohibits the Fredericksburg Christian School from receiving any EHA funding.

Defendant stresses that it has repeatedly indicated to the plaintiffs that a cued-speech interpreter is available through the Stafford County School System. Defendant refers to Virginia Code sections 22.1-216 and 22.1-218. Section 22.1-216 provides, quote:

A school board may provide special education for handicapped children either directly which its own facilities and personnel or under contract with another school division or divisions or any other public or private nonsectarian school, agency or institution approved by the Board of Education, unquote.

Section 22.1-218 provides, in relevant part, that, quote" if a school division is unable to provide a free, appropriate public education to a handicapped child and it is not properly available in a state facility, it shall offer to place the child in a nonsectarian private school for the handicapped approved by the Board of Education or such other licensing agency as may be designated by state law, unquote.

Because the Fredericksburg Christian School is a sectarian and not a nonsectarian private school, defendant contends that it is under no obligation to pay for plaintiffs' cued-speech interpreter. Schimmel by Schimmel v. Spillane, 819 F 2d 477 (4th Cir. 1987)

states that the Virginia statute makes clear that a school system can provide free appropriate education to handicapped children in private schools only when those schools are approved by the Virginia Board of Education or some other designated licensing agency. The statute simply does not permit school systems to place and fund handicapped children in unapproved private schools.

The Virginia statute's requirement of Board approval for private schools educating handicapped students is a State educational standard that has been incorporated into the EHA. See 20 U.S.C. section 1430(a)(4)(B), 34 C.F.R. 300.401(a)(3). Thus, school systems in Virginia could not place and fund handicapped children in unapproved

private schools without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet state educational standards. 819 F 2d 477 (4th Cir. 1987). The EHA defines "free appropriate education" to mean special education and related services that have been provided at public expense, under public supervision and direction, and without charge, and meet the standards of the state educational agency.

20 U.S.C. 1413(a)(4)(B) provides in part that, quote:

Handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized

education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such school or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter.

In reviewing a motion to dismiss, dismissal will not be warranted, quote, unless it appears to a certainty that the non-moving party would be entitled to no relief under any state of facts which could be proven in support of its claim. Adams v. Bain, 697 F 2d 1213, 1216, (4th Cir. 1982).

Summary judgment, quote, should be granted only where it is perfectly clear that no issue of fact is involved and

inquiry into the facts is not desirable to clarify the application of law. The burden is on the moving party to show that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, unquote. Charbonnages de France v. Smith, 597 F 2d 406, 414 (4th Cir. 1979).

In addition, as to the burden of the nonmoving party, the Supreme court has stated, quote:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of

proof at trial, unquote. Celotex Corporation v. Catrett, 477 U.S. 317 (1986).

Further, the mere existence as to an alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. That's Anderson v. Liberty Life, Inc., 477 U.S. 242, 247-248, (1986).

Both sides agree that Matthew is hearing-impaired, that the Fredericksburg Christian School is a private, religious school, and that the State of Virginia is, under appropriate circumstances, eligible for EHA funding. The Court will find, as the defendant's have argued, they have offered a cued public school, that this offer was rejected by the plaintiffs

Fredericksburg Christian School was a religious school the cued interpreter would be in class 100 percent of the time.

The Court finds that no genuine issue of material fact exists that this matter is appropriate for summary judgment.

The first issue is whether the EHA requires defendant Stafford County School Board to pay for a cued-speech interpreter for Matthew Goodall at the Fredericksburg Christian School. The EHA and the regulations promulgated thereunder provide that when a handicapped child has been placed at a private school by his parents (and not by the State), "special education" and "related services" should be provided.

The key issue which emerges from a review of the arguments made by both sides is how the EHA, its regulations and the companion Virginia statute provisions define "provide". Plaintiffs contend that "to provide" means to pay for the services of a cued-speech interpreter who is operating on the premises of the Fredericksburg Christian School. Defendant, however, argues that "to provide" means to make available the services of a cued-speech interpreter at a designated Stafford County public school, which defendant has so offered to the plaintiffs.

The case of McNair v. Oak Hills Local School District, 872 F 2d 153 (6th Cir. 1989) involved a situation similar to the one before the court. In McNair

the issue was whether defendant school district was obligated under the EHA and companion state law provisions to provide transportation to and from a private school to a hearing-impaired student. The Sixth Circuit put forth a four-part test to determine whether such a requested service must be provided. The Court stated that, quote:

Plaintiffs will succeed only if they establish that which section 1400(c) requires: (1) that the child is handicapped; (2) that transportation is a related service; (3) that the related service is designated to meet the unique needs of the child caused by the handicap; and (4) the school district must be responsible under EHA and its regulations for providing the related

services under the particular circumstances of the case at hand. McNair, 872 F 2d 156, unquote.

The McNair court found the third element not met, that the requested transportation was not a "related service designed to meet the unique needs of the child caused by the handicap".

Having found this element not satisfied, the court felt it unnecessary to proceed to the fourth element. In the case before the Court, a cued-speech interpreter is a service peculiar to the needs of a deaf person and thus is a service "designed to meet unique needs of the child caused by the handicap". The inquiry therefore turns on whether this fourth prong of the McNair test is

met, whether the school board must be responsible under the EHA and its regulations to provide this service.

The relevant regulations promulgated under the EHA indicate only that a local school board "shall provide" or that "provision is made by providing handicapped children with special education or related services". See 34 C.F.R. sections 300.451 and 452.

Further, numerous courts have held that the EHA does not require states to make available the best possible option. Springdale School District #50 of Washington v. Grace, 693 F 2d 41, 44, (8th Cir. 1982), citing Board of Education of the Hendrick Hudson Central

School District v. Rowley, 458 U.S. 176 (1982). See also Riley v. Ambach, 508 F. Supp. 1222, (S.D. N.Y. 1980).

In addition, the Virginia law provisions implementing the EHA make clear that any in-school (or on-premises) services of the type requested by the plaintiffs will only be furnished to approved nonsectarian schools. The Fredericksburg Christian School is not such a school. The Court therefore finds that the Stafford County School Board is not obligated to pay for a cued-speech interpreter operating on the premises of the Fredericksburg Christian School. The Court in reaching the decision is reaching it without resorting to the constitutional issues as can interpret it as such without

reaching constitutional issues as I feel I can so I'm not reaching constitutional issue. Accordingly the plaintiffs' motion for summary judgment is denied. The Court will grant defendant's motion for summary judgment.

I will enter an appropriate order.

I will recess until 10 o'clock Monday morning.

(At 4:15 p.m., the hearing on the above-entitled matter was concluded.)

This is to certify that the foregoing 13 pages are a true and correct transcription of my stenotype notes of the proceedings had on February 9, 1990, in the case of:

Matthew B. Goodall, et al.

vs.

Stafford County School Board

C.A. No. 89-1450-A.

This 6th day of March, 1990.

_____

OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

[Department of Education letter on related "bypass" issue: Goodall, 16 EHLR 1398 (1990)]

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 13, 1990

Robert B. Goodall, ESq.
Easterling & Goodall
Attorneys at Law
P. O. Box 177
Stafford, VA 22554-0177

Dear Mr. Goodall:

Thank you for your letter of March 28, 1990 to Dr. Judy Schrag, Director of the Office of Special Education Programs (OSEP), requesting a by-pass pursuant to 20 USC section 1413(d) of Part B of the Education of the Handicapped Act (EHA-B).

The EHA-B provides that State educational agencies (SEAs) must establish policies and procedures which ensure:

> that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services. 20 USC section 1413(a)(4)(A).

The by-pass provision you are asking the Department to invoke, which is set out as 20 USC section 1413(d), deals with certain specified circumstances under which State law prohibits the provision of special education and related services to students with handicaps enrolled by

their parents in private schools. The EHA-B regulation which implements this provision states that:

> (a) the Secretary implements a by-pass if a State educational agency is, and was on December 2, 1982, prohibited by law from providing for the participation of private school handicapped children in the program assisted or carried out under this part, as required by section 613(a)(4)(A) of the Act and by sections 300.451-300.452. 34 CFR sections 300.480(a) (emphasis added).

The Virginia law, which you cite as the basis for your by-pass request, provides that:

> A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions of any other public or private nonsectarian school, agency, or institution approved by the Board of Education. VA Code section 22.1-226 (emphasis added).

This statutory provision, on its face, only precludes a local educational agency (LEA) in Virginia from contracting with private sectarian schools for the purpose of providing special education to children with handicaps enrolled in those schools. There is nothing in this law which would prevent an LEA from using its own personnel and facilities to provide special education to those students, as long as it did not contract with a private sectarian school. At most, this law precludes LEAs from serving children with handicaps on the site of private sectarian schools. A limitation on the location at which some children with handicaps enrolled in private schools

can be served, however, does not constitute a prohibition against the participation of these children in the special education program carried out pursuant to the EHA-B by Virginia and its LEAs. As a consequence, your letter, as more fully explained below, does not establish the necessary basis for implementation of a by-pass.[1]

---

1. Your letter also does not provide any information on whether this law was in effect on December 2, 1982. We are therefore unable to determine whether it meets this criterion for implementation of a by-pass. However, it is not necessary for us to address this issue since we have concluded, on the basis of the information you have provided us, that Virginia law does not prevent public agencies in the Commonwealth of Virginia from meeting their EHA-B obligation to serve children with handicaps enrolled in private schools.

SEAs and LEAs do not necessarily have to provide services on the premises of private schools in order to meet their obligations under 20 USC section 1413(a)(4)(A). Rather, Department regulations provide that students with handicaps enrolled in private schools must be provided by SEAs and LEAs "with a genuine opportunity for equitable participation" in the special education programs carried out by these agencies. See 34 CFR section 76.651 (which is incorporated by reference into the EHA-B's regulations at 34 CFR section 300.41(b)). The Department has long held that it is possible for SEAs and LEAs to provide students with handicaps enrolled in private schools with a

genuine opportunity for equitable participation by serving them at a public school or neutral site.[2] Whether an LEA would have to provide on-site services to meet the "equitable participation" requirement would depend on the specific facts respecting each of the students with handicaps enrolled in private schools within its jurisdiction to whom it is providing services.

---

2. The Department, in response to public comment on the proposed by-pass regulation, explained that:

> No one way of delivering services to private school handicapped children is required under the EHA-B, either in States subject to a by-pass or the States that are not. 49 Fed. Reg. 48520-48521 (December 12, 1984).

These arrangements have included, among other things, serving children with handicaps enrolled in private schools at public school or neutral sites.

Your letter, at most, alleges that Virginia law prohibits the Stafford County LEA from providing a sign-language interpreter at the site of the private sectarian school attended by your son. The EHA-B by-pass provision, however, is only intended to be implemented on a State-wide basis. The Department, in response to public comment on the proposed by-pass regulation, explained that:

> The by-pass authority contained in Section 613(d) of the Act requires operation on a State-wide basis. Section 613(d) of the Act, in contrast to Chapter 1 of the Education Consolidation and Improvement Act of 1981, makes no provision for the implementation of a by-pass for only those local educational agencies that have substantially failed to provide for the participation on an equitable basis of private school handicapped children. 49 Fed. Reg. 48522 (December 12, 1984).

Implementation of a by-pass, therefore, is not an appropriate remedy in this instance because there has been no demonstration that the Virginia law has had a State-wide impact on the provision of services to students with handicaps enrolled in private schools. Moreover, there has been no demonstration that even the Stafford County LEA has failed to meet its obligations under the EHA-B because Section 613(a)(4)(A) does not provide each child with handicaps voluntarily enrolled in a private school with an individual entitlement to participate in the special education program carried out by the SEA and LEAs pursuant to the

EHA-B. The Secretary, in response to public comment on the proposed by-pass regulation, explained that:

> Section 613(a)(4)(A) only imposes an obligation on States to provide for the participation of handicapped private school children in the program carried out pursuant to the EHA-B and does not require that services be provided to each and every private school handicapped child. Moreover, Section 613(a)(4)(A) allows for consideration of the number and location of private school handicapped children in the State in providing services to those children. The Secretary views Section 613(a)(4)(A) as providing States and the Secretary with the discretion to devise, in consultation with private school representatives, the most efficient scheme possible for providing adequate special education and related services to a number of, but not necessarily all, private school handicapped children. This interpretation has been consistently followed by the department, and applied to States, under the original regulations for the EHA-B (45 CFR section 121a.451-121a.460 (1977)) and the [Education

Department General Administrative Regulations] EDGAR provisions which replaced them in 1980. 49 Fed. Reg. 48522 (December 12, 1984) (emphasis added).

Consequently, the Stafford County LEA, in order to meet its obligations under Section 613(a)(4)(A) of the EHA-B, does not necessarily have to provide for the participation of your child in its special education program. Similarly, even assuming that a by-pass were implemented in Virginia, there is no guarantee that your child would be served.

If you have additional information to support your request for a by-pass in the Commonwealth of Virginia, please

write us again and we will reconsider your request in light of that information.

Sincerely,

Robert R. Davila
Assistant Secretary

cc: Dr. William Helton
Virginia Department of Education

United States Constitution

Article VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

Title 1 of the Elementary and Secondary Education Act of 1965, formerly 20 USC sec 241e(a), subsequently sec 241e-1

(a) To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate ...

20 USC sec 1400 et seq, Individuals with Disabilities Education Act

20 USC sec 1401 (a)(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability including -

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

20 USC sec 1413 (a) . . . Each such plan shall -

(4) set forth policies and procedures to assure -

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

(B) (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as

required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

20 USC sec 1413(a) each state plan shall . . . (9) provide satisfactory assurance that Federal funds made available under this part [20 USCS sec 1411] (A) will not be commingled with state funds, and (B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this part [20 USCS sec 1411] . . .

20 USC sec 1415 (E)(2) Any party aggrieved by the findings and decision made under subsection (b) . . . shall have the right to bring a civil action

with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a direct court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

42 USC sec 1983 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

Federal Regulations

Regulations promulgated under Education of the Handicapped Act as amended by the Education of All Handicapped Children Act now Individuals with Disabilities Education Act 34 CFR sec 300.400 et seq

34 CFR sec 300.400 applicability of Regs. 300.401-300.403

Regs. 300-401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

34 CFR sec 300.401 responsibility of state educational agency

Each State edueational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized educational program which meets the requirements under Regs. 300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B))

34 CFR sec 300.402 implementation by state educational agency

In implementing Reg. 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires:

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B))

34 CFR sec 300.403, Placement of children by parents

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of

financial responsibility, are subject to the due process procedures under Regs. 300-500-300.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415)

34 CFR sec 300.450, Definition of "private school handicapped children"

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under Regs. 300.400-300.402.

(20 U.S.C. 1413(a)(4)(A))

34 CFR sec 300.451, State educational agencies responsibility

The State educational agency shall insure that -

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(20 U.S.C. 1413(a)(4)(A))

34 CFR sec 300.452, Local educational agency responsibility

(a) Each local educational agency shall provide special education and related services designed to meet the

needs of private school handicapped children residing in the jurisdiction of the agency.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

34 CFR sec 300.552 Placements

Each public agency shall insure that: . . . (c) unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and . . .

Comment . . . The overriding rule in this section is that placement decisions must be made on an individual basis. . .

Education division general administrative regulations (EDGAR) 34 CFR sec 76.1 et seq

34 CFR sec 76.1(a)
Programs to which Part 76 applies.

(a) The regulations in Part 76 apply to each State-administered program of the Department.

34 CFR sec 76.532 Use of funds for religion prohibited

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vacation; or

(2) Prepare them to teach theological subjects.

34 CFR sec 76.650 Private schools: purpose of sec 76.651-76.662

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary - under certain circumstances - to provide benefits directly to private school students. These "bypass" provisions - where they apply - are implemented in the individual program regulations.

sec 76.651 Responsibility of a State and a subgrantee

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in sec 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in sec 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1)

sec 76.652 Consultation with representatives of private school students

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.653 Needs, number of students and types of services

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.654 Benefits for private school students

(a) Comparable benefits. The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) Same Benefits. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) Different benefits; If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.655 Level of expenditures for students enrolled in private schools

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is

different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.656 Information in an application for a subgrant

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with sec 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1)

34 CFR sec 76.657 Separate classes prohibited

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.658 Funds not to benefit a private school

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than;

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.659 Use of public school personnel

A subgrantee may use program funds to make public personnel available to other than public facilities:

(a) To the extend necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school. (Authority: 20 U.S.C. 1221e-3(a)(1))

34 CFR sec 76.660 Use of private school personnel

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control. (Authority: 20 U.S.C. 1221e-3(a)(1)).

34 CFR sec 76.661 Equipment and supplies

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative

control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

34 CFR sec 76.662 Construction

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

Regulations promulgated under Title 1 of the Elementary and Secondary Education Act of 1965. Former section 45 CFR sec 116.19

(a) Each local education agency shall provide special educational services designed to meet the special

educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation.

(b) The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a

basis comparable to that used in providing for the participation of the program by educationally deprived children enrolled in public schools.

Virginia Constitution Article 8, sec 10

State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and

towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the

citizens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.

Virginia Statutes

Section 22.1-216 Use of public or private facilities and personnel under contract for special education

A school board may provide special education for handicapped children either directly with its own facilities and personnel or under contract with another school division or divisions or

any other public or private nonsectarian school, agency or institution approved by the Board of Education.

Section 22.1-218(A) Reimbursement of parents or guardian of handicapped children in private schools

A. If a school division is unable to provide a free appropriate public education to a handicapped child and it is not appropriately available in a state facility . . . it shall offer to place the child in . . . a nonsectarian private school for the handicapped approved by the Board of Education or such other licensing agency as may be designated by state law. . .

Section 22.1-219. Use of federal, state or local funds not restricted

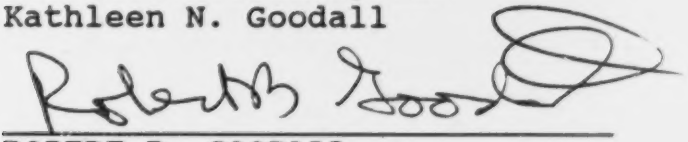
Nothing in this article shall be construed to restrict or prohibit the use of any federal, state or local funds made available under any federal, state or local appropriation or grant. (Code 1950, sec 22-10.9; 1974, c. 480; 1980, c. 559.)

Section 22.1-220. Power of counties, cities and towns to appropriate and expend funds for education of handicapped children

The governing body of any county, city or town is hereby authorized and empowered to appropriate and expend funds of the county, city or town in furtherance of the education of handicapped children residing in such county, city or town who attend . . .

public or private, nonsectarian schools, whether within or without the county, city or town and whether within or without the Commonwealth. (Code 1950, sec 22-10.10; 1974, c. 480; 1980, c. 559; 1989, c. 106.)

MATTHEW B. GOODALL, an infant
by his father and next friend,
Robert B. Goodall, and
Kathleen N. Goodall

BY: 

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